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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 468

749458
Sup. Ct.

GERMAN-AMERICAN VOCATIONAL LEAGUE, INC., D. A. B.
RECREATIONAL RESORT INC., OTTO BREMER, *et al.*,
Petitioners,

vs.

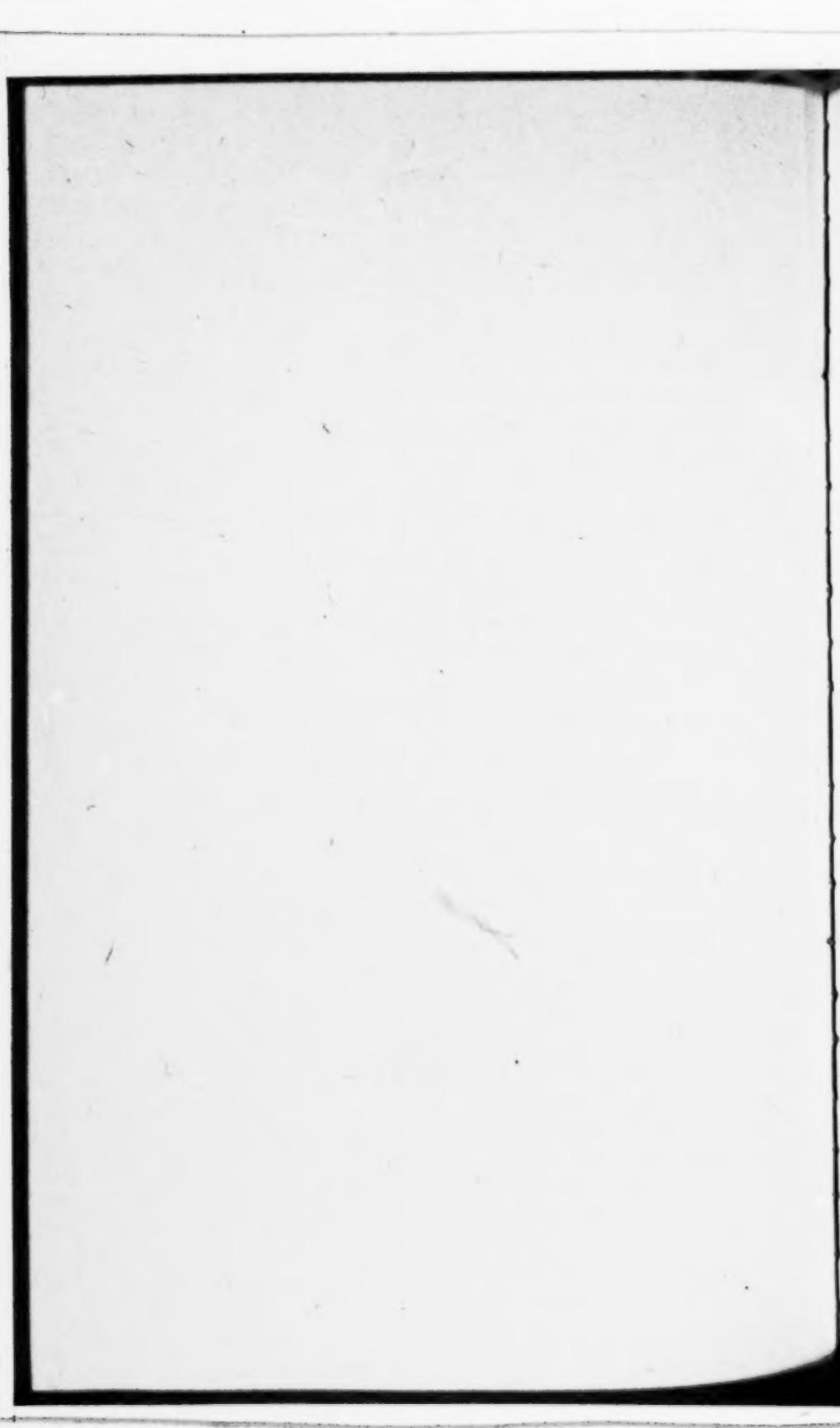
THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

GEORGE C. DIX,
Attorney for Petitioners.

EDWARD R. LOOMIE,
Of Counsel.

September 5, 1946.



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THE UNITED STATES OF AMERICA,
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**PETITION FOR WRIT OF CERTIORARI TO THE
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*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioners respectfully apply for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review an order of that Court filed July 8, 1946 granting respondent's motion to dismiss petitioner's appeal from an order of the United States District Court denying their motion for a new trial. Petitioners were convicted in June 1944 for conspiring to violate the Foreign Agents Registration Act of 1938, as amended in 1939, and to defraud the United States (18 USC sec. 88; 22 USC secs. 601, 611-616). Petitioner Bremer was sentenced to two years' imprisonment. Each of the two corporate petitioners was fined. On appeal the convictions were affirmed by a divided court. Application for a writ of certiorari was denied.

After the argument of the appeals it was discovered that respondent had concealed and suppressed material evidence favorable to and demanded by the defense which was in its possession at the time of the trial. Petitioners moved for a new trial based on this newly discovered evidence and in their moving affidavits described the fraud practiced on the Court. Respondent did not answer, deny or explain the accusations. On the return day June 14, 1946 the Trial Court summarily denied petitioners' motion without requiring respondent to answer, explain or deny the accusations. Petitioners immediately filed notice of appeal. Respondent promptly moved to dismiss the appeal. On July 8, 1946, the Circuit Court of Appeals granted respondent's motion.

No complete transcript of the record of the testimony taken at the trial was printed. In connection with the application for a writ of certiorari during the October Term 1945 of this Court four volumes of Joint Appendix were filed under Index Numbers 925-933, to which references are respectfully made in connection with this application. The page references in the moving affidavits refer to said Joint Appendix.

Opinions Below.

The Trial Court rendered no opinion either at the trial or in connection with the denial of the motion appealed from. The opinion of the Circuit Court of Appeals affirming the convictions is found at 153 Fed. (2) 860, and the opinion granting the motion to dismiss the appeal is found at R. 26.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 938, 28 USC 347).

Questions Presented.

1. Did the Circuit Court of Appeals err in dismissing petitioners' appeal from the District Court's denial of their motion for a new trial based on newly discovered evidence in view of the uncontradicted charges that the Government concealed and suppressed material evidence favorable to and demanded by the defense which was in its possession at the time of the trial.
2. Did the Trial Court abuse its discretion in summarily denying petitioners' motion for a new trial without requiring respondent to answer, deny or explain the accusations contained in petitioners' moving affidavits.
3. Did the Trial Court and the Circuit Court of Appeals err in refusing to grant a new trial in view of the clear showing that petitioners' constitutional right to due process was violated by respondent's use of manufactured and falsified evidence.
4. Was the evidence fairly presented, and did petitioners have a fair trial.

Summary Statement.

This is essentially a civil rights case. German-American Vocational League, Inc. is a New York

membership corporation formed by citizens of German origin or ancestry, and is in the nature of a white-collar workers union with branches in several cities in the United States. D. A. B. Recreational Resort Inc. is a wholly owned subsidiary organized for the sole purpose of holding title to a tract of New Jersey real estate used as a summer resort by the members. Petitioner Bremer was leader of the Philadelphia local, and as such ex officio a director of the New York corporation.

Respondent claims the corporations were within the scope of the McCormack Act. Petitioners were indicted and convicted for an alleged conspiracy to induce the corporate petitioners not to register pursuant to that Act. The trial was conducted during the months of March, April and May 1944 in an atmosphere of war-time hostility.

In an attempt to show that the corporate petitioners were agencies of the German Reich the prosecution exhibited a motion picture to the Court and jury representing it as a motion picture shown by one of the corporate petitioners at public meetings in 1936. The defense challenged the accuracy of this representation by calling the attention of the Court to the fact that the film shown to the jury was different from the film shown in 1936 in that essential parts had been omitted and the titles changed to conceal the omissions. This the prosecution was unable to refute. On motion of defense counsel the Court ordered the film impounded.

After the case had gone to the jury it was discovered that the very film exhibited to the jury as shown by petitioners in 1936 had in fact been manufactured by the Office of War Information in 1942. The

Trial Court ordered the impounded film to be produced in the Circuit Court of Appeals during argument of the appeal. After argument of the appeal it was discovered that another film had been substituted for the impounded film (R. 7).

Further investigation revealed that the complete film, including all the missing parts, had at all times during the trial been owned by, and been in the possession of respondent's agent the Alien Property Custodian (R. 7), who was interested in the trial by reason of the fact that he had vested the property of the two corporate petitioners (R. 19). Attempts on the part of petitioners to obtain an explanation for this substitution of the film from the Museum of Modern Art, an institution having actual physical custody of the film, were met on August 10, 1946 with the reply that "your questions involve matters of national security" (R. 8).

When petitioners and others convicted in the action petitioned this Court for a writ of certiorari all these facts were not known to the petitioners and were not before this Court.

Although the prosecution has had many opportunities to deny or refute the charges of concealing, suppressing and substituting evidence it has failed to do so.

The Trial Court ignored these uncontroverted accusations and summarily denied petitioners' motion for a new trial. Petitioners appealed, whereupon respondent promptly moved to dismiss their appeal. The Circuit Court of Appeals ignored the charges of substitution of the film in connection with the appeal pending before it and granted respondent's motion to dismiss.

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the Trial Court did not abuse its discretion in denying petitioners' motion for a new trial in view of the fact that petitioners subsequently discovered that respondent had suppressed and concealed important evidence which was in its possession at the time of trial and substituted therefor manufactured evidence.
2. In holding that the Trial Court did not abuse its discretion in denying petitioners' motion for a new trial in view of the fact that respondent neither on the return day of the motion nor subsequently denied the accusation that evidence was suppressed and concealed by it during the trial and that manufactured evidence was substituted therefor.
3. In holding that the Trial Court did not abuse its discretion in failing to require the Government to answer or deny the accusations of petitioners with respect to the fraud practiced upon the Court and in failing to grant petitioners an opportunity to present proof of such fraud to the Court.
4. In holding that concealing and suppressing important evidence is not "pertinent" in this case.
5. In holding that no new evidence was discovered.

Reasons for Granting the Writ.

Petitioners did not have a fair trial and were denied due process when the prosecution misrepresented to the Court and jury that the film made in 1942 by the Office of War Information was the film shown by petitioners in 1936. By so doing the prosecution failed to observe the fundamental rules of fairness and truthfulness essential to our concept of justice. This Court has reiterated time and time again the standards it will look for in criminal prosecutions. *Lisenba v. California*, 314 U. S. 219; *Chambers v. Florida*, 309 U. S. 227; *Mooney v. Holohan*, 294 U. S. 103; *Casebeer v. Hudspeth*, 121 F. (2) 914, writ of mandamus denied 314 U. S. 579, rehearing denied 314 U. S. 710.

Respondent had repeated opportunities but has not contradicted the accusations of fraud in suppressing valid and using manufactured evidence. Such failure to contradict must be taken as an admission of wrongdoing. Silence then becomes evidence of the most convincing character. *Mammoth Oil Co. v. United States*, 275 U. S. 13, 52; *Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 111; *Bilokumsky v. Tod*, 263 U. S. 149, 153, 154; *Kirby v. Tallmadge*, 160 U. S. 379, 383; *Runkle v. Burnham*, 153 U. S. 216, 225.

This Court has repeatedly condemned convictions of criminal offense obtained through insufficient and flimsy evidence when the prosecution's aim was to use a regulatory statute to punish for political beliefs. *Keegan v. United States*, 325 U. S. 478; *Hartzell v. United States*, 322 U. S. 680; *Schneiderman v. United*

States, 320 U. S. 118; *Bridges v. Wixon*, 326 U. S. 135. From the moving affidavits it is clear that the instant case is just such a case of using a regulatory statute to punish for political beliefs.

In view of the uncontradicted accusations of fraud in suppressing and concealing material evidence favorable to petitioners and using specially manufactured unfavorable evidence the ruling of the Trial Court denying petitioners' motion for a new trial and the Circuit Court's dismissal of their appeal from said ruling is in conflict with the decisions of this Court and presents a matter of sufficient public importance for this Court to determine whether reversible error has been committed.

CONCLUSION.

**For the reasons stated, it is respectfully submitted
that the petition for writ of certiorari should be
granted.**

GEORGE C. DIX,
Attorney for Petitioners.

EDWARD R. LOOMIE,
Of Counsel.

September 5, 1946.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 468

GERMAN-AMERICAN VOCATIONAL LEAGUE, INC., D. A.
B. RECREATIONAL RESORT INC., OTTO BREMER
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On June 2, 1944, petitioners were convicted in the District Court for the District of New Jersey of conspiracy to violate the Foreign Agents Registration Act of 1938. Their convictions were affirmed by the Circuit Court of Appeals for the Third Circuit on January 31, 1946 (153 F. 2d 860), and a petition for

writs of certiorari was denied by this Court on April 29, 1946 (Nos. 925-933, Oct. T. 1945).

Thereafter, on June 4, 1946, a little more than two years after the judgments of conviction, petitioners obtained from the district court an order requiring the Government to show cause why a new trial should not be granted on the ground of newly discovered evidence (R. 3). Insofar as the affidavits in support of the motion related to the trial of the case, they alleged that a German propaganda film, "The Triumph of Will," which was shown to the jury during the trial as part of the Government's case, was not the same film as that shown at the meetings of the Vocational League, and that the film sent to the circuit court of appeals as an original exhibit in the case was not the same film as that shown to the jury (R. 5-9). In addition, the affidavits alleged that the entire prosecution was part of a conspiracy by officials of the Department of Justice against persons of German origin (R. 4-5, 9-23). The district court denied the motion, and petitioners appealed (R. 1). On the motion of the United States Attorney, the circuit court of appeals dismissed the appeal (R. 26-27), stating in a per curiam opinion (R. 26; 156 F. 2d 235):

The matter offered by the appellants, allegedly constituting newly discovered evidence, insofar as any part thereof is pertinent, is old and was before the court below at the trial and was before this court on the appeals.

Consequently the court below committed no error in refusing a new trial and the motion of the United States to dismiss the present appeals will be granted. * * *

The decision of the court below is clearly correct. Even assuming that petitioners' motion was timely,¹ their contention that the film exhibited to the jury was not the same as the film shown at the meetings was raised at the trial and was discussed by the circuit court of appeals in affirming the convictions. 153 F. 2d at 865. Since the film was only a minor part of the evidence against petitioners (see Brief for the United States in Opposition, Nos. 925-933, Oct. T. 1945, pp. 6-21), and the circuit court of appeals was not obliged to view the film in order to determine that there was sufficient evidence to support the verdict, the alleged substitution of the exhibit sent to the circuit court of appeals would be immaterial. The trial court therefore properly ruled that petitioners had presented no newly discovered evidence justifying a new trial, and its judgment in the exercise of its discretion in this respect presents no question for review by this Court.

¹ Petitioners' motion for a new trial was made a little more than two years after the judgments of conviction. Rule 33 of the Federal Rules of Criminal Procedure, effective March 21, 1946, provides that a motion for a new trial on the ground of newly discovered evidence "may be made only before or within two years after final judgment." It is our view that "final judgment" as used in the rule refers to the judgment of conviction rather than to the judgment on appeal or on petition for certiorari.

We therefore respectfully submit that the petition
for a writ of certiorari should be denied.

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✓ THERON L. CAUDLE,
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✓ ROBERT S. ERDAHL,
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Attorneys.

SEPTEMBER 1946.